No. [illegible]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

CHARLES O. PORTER,

Petitioner,

v.

CHRISTIAN A. HERTER,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to the Court of Appeals to review the judgment in this case of the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The opinion of the District Court is not reported, but is printed in Appendix A, *infra*, p. 27. The opinion of the

Court of Appeals is reported at 278 F. 2d 280 and is printed in Appendix B, *infra*, p. 28. The court below based its decision on its earlier opinions in *Worthy* v. *Herter*, 270 F. 2d 905, *cert. denied*, 361 U.S. 918 (1959), and *Frank* v. *Herter*, 269 F. 2d 245, *cert. denied*, 361 U.S. 918 (1959), both of which are printed in Appendix C, *infra*, p. 31, for the convenience of the Court.

Jurisdiction

Summary judgment was entered against petitioner by the United States District Court for the District of Columbia on October 1, 1959. Petitioner docketed his appeal in the Court of Appeals for the District of Columbia Circuit by filing the original record in the Court of Appeals on October 5, 1959. Thereafter petitioner invoked the jurisdiction of this Court under 28 U.S.C. 1254(1) to grant certiorari before judgment in the Court of Appeals because of the relationship of the question presented to those raised in then pending petitions for certiorari in *Worthy* and *Frank*. On December 7, 1959, this Court denied certiorari in *Worthy* and *Frank*, and, consequently, in this case as well. Thereafter, on April 14, 1960, the Court of Appeals for the District of Columbia Circuit rendered its opinion and judgment, affirming the District Court's action. A timely motion for rehearing en banc was denied on May 9, 1960. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether the Department of State has authority, under existing statutes, Presidential orders and constitutional provisions, to bar a Member of Congress from traveling to Communist China in pursuance of his legislative functions.

Constitutional Provisions, Statutes and Regulations Involved

The constitutional provisions, statutes and regulations involved in this case are those considered by the Court in *Kent* v. *Dulles*, 357 U.S. 116, and are set forth in Appendix D, *infra*, p. 50.

Statement of the Case

Petitioner, Charles O. Porter, is a Member of Congress representing the Fourth Congressional District of Oregon. Since his election to the Congress in 1956, petitioner has taken an active interest in the foreign affairs concerns of the United States: visiting foreign countries, introducing bills, testifying at hearings, speaking on the floor, and the like. Petitioner is specially concerned about United States relations with China, a country with which his district and state historically have had trade relationships.

In the spring of 1959 petitioner decided to visit China to gather firsthand information concerning conditions there, but his passport bore the customary notation "not valid . . . for travel to . . . those portions of China . . . under Communist control." Accordingly, on June 10, 1959, petitioner wrote the Secretary of State for permission to visit China with a party of two China specialists, two Oregon journalists, three Oregon businessmen, and an interpreter. Petitioner explained in this letter that "The purpose of my visit is to learn about the conditions and potentialities of trade and other facts relating to our policies and legislative aspects" (R. 56).

By letter of July 2, 1959, from an Assistant Secretary, petitioner was informed that his request was denied and told that "as a Member of Congress your visit would

be interpreted throughout Asia as well as by the Communist Chinese as a basic change of policy" (J.A. 11).[1] By subsequent letter from the same Assistant Secretary, dated August 25, 1959, petitioner was informed that he had exhausted his administrative remedies: "Actions denying validation of passports for Communist China are based upon foreign policy considerations and consequently raise no issues for determination by administrative procedures" (J.A. 4).

On August 27 petitioner filed suit for injunctive and declaratory relief and asserted that the denial of passport facilities impaired his rights as a Member of Congress as well as his freedom to travel as an American citizen under the First and Fifth Amendments. Petitioner further asserted that there is no statutory basis authorizing such limitation upon his freedom of movement and that the denial of his right to travel while authorizing others to travel was unreasonable and discriminatory, in violation of his rights under the due process clause of the Fifth Amendment (J.A. 4-5).

On September 15, 1959, petitioner moved for summary judgment (J.A. 13). In his affidavit accompanying the motion (J.A. 14-15), petitioner pointed out that he deemed it necessary

> "in order fully and knowledgeably to perform my legislative functions as a Member of Congress, to visit

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[1] Subsequently, on September 1, 1959, John W. Hanes, Jr., the representative of the State Department before the Special Subcommittee of the Senate Committee on Government Operations holding hearings on pending passport legislation, was asked about the *Porter* case and responded that the passport restriction was necessary because Porter's travel might "embarrass the United States in its foreign relations" (R. 106). That only this foreign relations consideration and not petitioner's safety underlay the Department's action is further evidenced by Hanes' testimony that he was "quite certain that the Communist Chinese would make very certain that nothing happened to him, because it would be to their propaganda advantage to see that nothing did . . ." (R. 106).

> Red China to gain first hand information concerning conditions there, and also as to the character, purposes and designs, domestic and international, of the political leadership of that Nation, and the potentialities and circumstances of trade between Red China and the United States."

Petitioner's motion was also supplemented by a transcript of the testimony before a Senate Subcommittee given by a representative of the Department of State, conceding that on a trip to Communist China no harm would come to petitioner because he would have the full protection of the Government of that nation (R. 106-7), and by Secretary Herter's answers to interrogatories propounded by petitioner demonstrating that the Department has no separate policy concerning travel to Communist China by Members of the Congress (J.A. 20).

On September 25, 1959, the Government filed a cross-motion for summary judgment (J.A. 21). The District Court denied the motion of petitioner and granted that of the Government with an oral opinion that:

> "I am prepared to decide this case immediately. First of all, I believe it is governed by the *Frank* case and the *Worthy* case. You are asking this Court to interfere with the Executive function of the foreign policy of the United States; that is number two; and number three, you are asking, in the circumstances, that an ordinary citizen, who happens to be a Congressman, not traveling on official congressional business, be granted a passport when the Secretary of State concludes it would be to the best interests of the country not to do so" (J.A. 26).

On appeal, the court below affirmed in reliance on its earlier opinions in *Worthy* v. *Herter*, 270 F. 2d 905, *cert.*

denied, 361 U.S. 918 (1959), and *Frank* v. *Herter*, 269 F. 2d 245, *cert. denied*, 361 U.S. 918 (1959), adding that "Although he is a member of Congress, that status alone does not entitle him [petitioner] to be exempted from regulations or orders of the Executive Department in matters within the latter's constitutional competence."

Reasons for Granting the Writ

I

The State Department's Prohibition on Travel of American Citizens to Specified Foreign Areas Is Without Statutory or Presidential Authorization, Raises Important Questions of Federal Law and Conflicts with Kent v. Dulles and Greene v. McElroy

Millions of Americans hold passports which contain the restriction that they are not valid for travel to ". . . and those portions of China, Korea and Viet Nam under Communist control." Despite the broad abridgement of the right to travel contained in this pervasive passport restriction, there is not today in existence any clear statement of the position of the Government as to the basis of its authority to impose this restriction. Although the Solicitor General conceded to this Court in arguing *Kent* that there was no "inherent Executive power to restrict the travel of citizens" (Gov. Br. in *Kent*, p. 93), the Government argued below in petitioner's case that the authority to impose area bans stemmed precisely from the "Executive's authority in the field of foreign relations" (Br. p. 6). The court below, unable to follow the Government in its alternate reliance upon statutory and inherent authority, simply affirmed on the basis of *Worthy* and *Frank*, wherein both statutory and inherent authority had been found for the travel restriction. But, as we shall now show, there is neither statutory authority, nor inherent power, nor Presi-

dential exercise of inherent power if there were any, and consequently the State Department's restriction upon the constitutional rights of millions of citizens is totally without authority.

1. *No statutory authority.* Beginning with the Act of April 30, 1790, 1 Stat. 118, Congress has enacted some 30 or more statutes relating to passports, but in no one of them has Congress ever authorized the President to ban American travel to particular foreign areas.[2] Nor is this continuing failure of Congress to grant such power inadvertent. After this Court's decision in *Kent* restricting existing statutes to passport denials for want of citizenship and for illegal conduct, the President, on July 7, 1958, sent a special message to the Eighty-fifth Congress which reads in part: "The secretary should have clear statutory authority to prevent Americans from using passports for travel to areas where there is no means of protecting them, or where their presence would conflict with our foreign policy objectives or be inimical to the security of the United States."[3] A bill drafted by the Executive branch (S. 4110) was thereupon introduced by Senator Theodore F. Green, Chairman of the Committee on Foreign Relations, at the request of the Executive branch.[4] This bill specifically authorized the Secretary of State to impose area travel bans.[5] Deputy Under Secretary of State Robert D.

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[2] Edwards, *Legislative History of Basic Passport Acts*, printed in *The Right To Travel*, Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 85th Cong., 1st Sess. (1957), p. 185. In 1834 Congress required aliens, but not citizens, to obtain passports from the War Department before entering Indian country. 4 Stat. 730; R.S. 2134.

[3] 104 Cong. Rec. 1932-33.

[4] *Passport Legislation*, Hearings before the Committee on Foreign Relations, United States Senate, 85th Cong., 2d Sess. (1958), p. 1.

[5] Sec. 401.

Murphy testified to the Committee on Foreign Relations on July 16, 1958, that enactment of the Administration bill was necessary and urgent "because, as the President points out, the Supreme Court's decision of June 16 severely limited the authority of the Secretary of State to deny passports. The Supreme Court specifically said that the Secretary has no authority, in the absence of statute, to deny passports."[6] Despite the urgent pleas of the Administration for action, the Eighty-fifth Congress adjourned without granting the requested authority.[7]

The Eighty-sixth Congress has been no more receptive. "The Executive has continued to press for action"[8] in the passport field. The House Committee on Foreign Affairs reported out a passport bill authorizing a ban on area travel. The Committee report stated that the need for legislation stemmed from the *Kent* decision and that the bill "is intended only to deal with the most urgent aspects of the problem."[9] Nevertheless, despite the cry of urgency for "clear statutory authority," Congress has thus far continued deliberation without enacting a passport bill.[10]

This Court having found in *Kent* that existing statutes are inadequate to support passport restrictions (other than for non-citizenship and unlawful conduct) and Congress having refused to supply the missing authority, the Government now goes to inherent power as its

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[6] *Passport Legislation*, Hearings before the Committee on Foreign Relations, United States Senate, 85th Cong., 2d Sess. (1958), p. 21.

[7] In the waning days of the session, the House of Representatives passed a passport control bill without area restrictions on travel (H.R. 13760), but the Senate refused to act.

[8] H. Rep. No. 1151, accompanying H.R. 9069, p. 2.

[9] *Ibid.*

[10] H.R. 9069 was passed by the House on September 8, 1959. The Senate Committee on Foreign Relations has yet to report favorably on any of the three or four bills referred to it for consideration.

justification for the restriction here in issue. The court below, however, reaffirming *Worthy*, continues to rely upon the statutes found inadequate in *Kent*: the Passport Act of July 3, 1926, 44 Stat. 887, 22 U.S.C. 211(a) and the Immigration and Nationality Act of 1952, sec. 215(a), 66 Stat. 190, 8 U.S.C. 1185. But the Passport Act of 1926 merely provides that "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate. . . ." This is a codification of a century-old statute (11 Stat. 52 (1856)) intended to prevent various state and municipal officials from issuing passports and contains no authority, explicit or implicit, to forbid travel to areas designated by the Secretary. Nor does the Immigration and Nationality Act of 1952 authorize any restrictions upon the places to which one may travel. It merely makes it illegal for citizens to "depart from or enter the United States" without a passport. A criminal statute precluding departure from the United States without a passport cannot by any stretch of the imagination be deemed to authorize regulations precluding entry into specific foreign countries.

Thus the language of the statutes relied upon by the court below gives even less support for the restrictions here sought to be imposed than for those found outside the statutes in *Kent*. And Congress having refused to grant the passport restriction powers requested by the Executive after *Kent*, it is even less justifiable here than in *Kent* to presume that "the Secretary has been silently granted by Congress . . . pervasive power to curtail in his discretion the free movement of citizens." 357 U.S. at 130.

2. *No inherent power.* The court below found "inherent" power in the Executive to impose the China travel ban as an exercise of "the power of the Executive in

foreign affairs" (see p. 39, *infra*). But the theory of this holding was disavowed by the Solicitor General and by this Court in the *Kent* case and finds no support anywhere in the Constitution.

In its brief in the *Kent* case, while urging upon this Court the existence of statutory authority to deny passports, the Government expressly stated that:

> ". . . we make no claim of such inherent Executive power to restrict the travel of citizens" (p. 93).

This Court was in agreement, stating (357 U.S. at 129):

> "If we were dealing with political questions entrusted to the Chief Executive by the Constitution we would have a different case. But there is more involved here . . . As we have seen, the right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the lawmaking functions of the Congress. *Youngstown Sheet & Tube Co.* v. *Sawyer*. . . ."

The Solicitor General's considered concession in the *Kent* brief is in accord with constitutional contemplation. Even before the adoption of the Constitution, "the liberty of going abroad when he pleases" was assumed to be the right of every Crown subject;[11] indeed, the action of the Crown in banning travel and migration to western areas was one of the "long train of abuses" specifically set forth in the Declaration of Independence. The freedom of "ingress and regress," linked together with "the privileges of trade and commerce," was expressly guaranteed by the Articles of Confederation.[12] The fact that

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[11] 1 Bl. Comm. 134.

[12] Art. IV.

no specific mention is made of the right of travel in the Constitution has generally been interpreted as proof that it was regarded as unchallenged, basic and essential.[13]

It is thus questionable indeed whether power resides anywhere in our Government to restrict freedom of travel. If, however, travel is to be restricted at all, the Constitution contemplates that such restriction "must be pursuant to the lawmaking functions of the Congress." *Kent* v. *Dulles*, 357 U.S. at 129. The constitutional separation and delegation of designated powers makes this self-evident. Although the Constitution does lodge power in the President to initiate treaties, appoint ambassadors, and receive ambassadors,[14] it lodges the powers most analogous to travel control in the Congress: to lay and collect duties, imposts and excises; to regulate commerce with foreign nations;[15] to establish an uniform rule of naturalization; to define and punish piracies and felonies committed on the high seas;[16] and to regulate migration.[17] Thus, if the power to restrict travel can in any way be deemed an exercise of the foreign affairs power, which we deny, it can only be deemed within the area of foreign affairs authority delegated by the Constitution to the Congress.

Throughout American history it has been assumed that whatever limited restrictions on travel may be imposed, such restrictions must be authorized by Congress. Thomas Jefferson stated that the Executive has no authority to control travel "except as he may be authorized from time

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[13] See Jaffe, *The Right To Travel: The Passport Problem*, 35 Foreign Affairs 17 (1956).

[14] Art. II, secs. 2, 3.

[15] Petitioner sought permission for himself and a party of Oregon businessmen to visit China to study, *inter alia*, "the conditions and potentialities of trade." J.A. 2.

[16] Art. I, sec. 8.

[17] Art. I, sec. 9.

to time by the legislature."[18] The first wartime regulation of travel in 1815 was authorized by Congress, 3 Stat. 195,[19] and when in 1918 a similar wartime restriction was again imposed, the necessity for Congressional action was explained in these words:

> "the Attorney General has formally ruled that neither the President nor the Executive departments have power to curb the general departure and entry of travelers."[20]

Until the recent imposition of area restrictions by the Department of State, no such inherent Executive power had ever been claimed throughout our entire history. The assertion by the Department of State of "inherent power" to restrict the travel of American citizens, flies in the face of the constitutional tradition accepted by this Court and the Government in *Kent*, and demands the corrective writ of this Court.

3. *No exercise of inherent power.* Even if there were inherent power over foreign travel, which there is not, the President has not sought to exercise any such power. This Court made clear in *Greene* v. *McElroy*, 360 U.S. 474, that it would not consider the existence of inherent power until the President, through "explicit action," had sought to exercise such power. No more than in *Greene* has any

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[18] Jefferson, *Draft of a Fundamental Constitution for the Commonwealth of Virginia*, proposed in 1783, quoted by Mr. Justice McReynolds, dissenting, in *Myers* v. *United States*, 272 U.S. 52, 235.

[19] The so-called Civil War ban on travel was nothing more than a denial of passports to "insurrectionary agents" sent to Europe "on errands hostile and injurious to the peace of the country and dangerous to the Union." 3 Moore's *International Law Digest*, § 512. This denial of passports "to facilitate" and "thereby to countenance" travel abroad for the purpose of violating laws of this country is in no way equivalent to denying the right to travel.

[20] H. Rep. No. 485, 65th Cong., 2d Sess., p. 2.

President, by explicit action or otherwise, sought to exercise inherent power to restrict travel abroad.

While the court below found the "explicit action" required by *Greene* in Executive Order No. 7856, 3 Fed. Reg. 681 (1938) and in Presidential Proclamation No. 3004, 67 Stat. C. 31 (1953), neither supports that conclusion.

Executive Order 7856, issued in 1938, authorized the Secretary of State "in his discretion . . . to restrict a passport . . . against use in certain countries." But the only sanction therein for violation of the passport restriction was that "the protection of the United States may be withdrawn from him [the violator] while he continues to reside abroad." At the time of the promulgation of this order in 1938 a passport was not a legal necessity for any travel. Thus, this order was a device to discourage travel, not a legal prohibition; *authority to discourage travel is not authority to forbid it.* Furthermore, all apart from the fact that the authority granted by the 1938 order was not the authority sought to be exercised here, that order was not even an attempt to exercise inherent authority, for it shows on its face that it was issued by the President pursuant to the presumed authority of the Passport Act of 1926.

President Truman's Proclamation in 1953, No. 3004, similarly did not authorize the Secretary of State to make it unlawful for American citizens to enter particular foreign countries. All this proclamation did was to forbid "the departure and entry of citizens and nationals of the United States from and into the United States" without a passport. Obviously, an order precluding departure and entry from and into the United States without a passport is far removed from the problem of precluding entry into a particular foreign country. Moreover, like the 1938 order, this proclamation was predicated upon the presumed authority

of a statute, the Immigration and Nationality Act of 1952, and not upon any asserted inherent power.

Neither of the presidential actions relied upon can remotely meet the standard of explicitness of exercise of inherent power required by *Greene*.[21]

* * * * * * * *

In sum, the power to restrict foreign travel of American citizens, asserted by the Department of State and exercised in petitioner's case by an Assistant Secretary, fails to find support in any statute, any inherent power of the President, or any exercise of inherent power. It is bad enough that the right of the individual citizen to travel has been restricted without a shred of legal sanction; it is even worse when, as here, the unauthorized restriction upon travel serves to impair the legislative need for information on a subject of vital national concern.

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[21] To make matters worse there is not even action by the Secretary of State approving the Communist China travel ban presently applied by the Department. Secretary Herter's sworn interrogatory answers reveal that he has not personally reviewed and promulgated the present policy of passport restriction here in issue (Interrogatory Answers 2(b) and 5, J.A. 19, 20). While petitioner denies the existence of the power of passport restriction asserted by the Secretary, if the Secretary does indeed hold such power, the very least that is required in view of the constitutional rights here being impaired is that the policy be personally approved and promulgated, and seasonably and periodically reviewed, by the Secretary himself. So sweeping a proscription on freedom of travel cannot properly be committed to the power of some assistant or division head or to the decision of a former Secretary rendered many years ago in the light of considerations no longer appropriate or germane.

II

The State Department's Challenged Authority to Ban Travel to Foreign Areas Has Been Exercised Far More Arbitrarily Against Congressman Porter Than It Was Against the Petitioners in Worthy and Frank

A denial of certiorari, of course, "is not a precedent for like action in a similar case . . ."[22] Therefore, the denial of certiorari in *Worthy* and *Frank* would not, even if this case were identical, be a precedent for the denial of certiorari here. In fact, however, though the asserted power being challenged in this case is the same as that challenged in *Worthy* and *Frank*, the resemblance ends there, for the exercise of that power is far more arbitrary and indefensible on the record here presented.

There is here no conceivable justification for the exercise of the State Department's discretion to restrict travel, if in fact it has any authority for the exercise of such discretion. There is here no suggestion, as in *Worthy*, that Congressman Porter had "knowingly and wilfully violated the travel limitations in his expired passport," conduct described by the Government in *Worthy* as "closely allied to the class of cases in which the Court in *Kent* recognized a refusal as appropriate, i.e., when an applicant 'was participating in illegal conduct' . . ."[23] There is here no suggestion, as in *Frank*, that the Court should stay its review because the Department was currently engaged in an experimental program permitting certain categories of newsmen to visit China.[24]

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[22] Stern and Gressman, *Supreme Court Practice* (2d ed., 1954), pp. 149-150.

[23] Brief for Respondent in Opposition, No. 444, October Term, 1959, pp. 11-12.

[24] *Frank* v. *Herter*, *infra*, p. 49.

But the differences with *Worthy* and *Frank* are far greater than Worthy's misuse of his previous passport and Frank's relationship to an experimental program for newsmen. The exercise of discretion here, if indeed there be any such discretion to exercise, must be based on a balance of the need of the traveler to go with the dangers to the Government if he does go. The need of the traveler here—to obtain firsthand legislative information concerning the most populous country of the world whose activities and purposes almost daily confront the Congress—is far more essential than the need for travel in *Worthy* and *Frank* where two additional newsmen sought to add their names to the list of newsmen already permitted to visit the Chinese mainland. Moreover, the possible danger to the Government from China travel stressed in *Worthy* and *Frank*—the extrication from trouble in a foreign country of American newsmen described as "blustering . . . to seek 'especially stories that involve the risk of war' "—is admittedly not present here, for the Government has conceded that Congressman Porter would be well protected in China.

1. *Petitioner Seeks To Visit Communist China To Satisfy a Vital Need for Firsthand Information by Members of the Congress on a Subject of Major Legislative Concern*

Petitioner desires to visit Communist China for the more knowledgeable performance of his Congressional functions. Congressman Porter's state and district have historically had trade relationships with China. Congressman Porter has long concerned himself with the important shipping, commercial and trade interests of the state he represents and the relationship of these interests to the nation's foreign policies (J.A. 2). He sought entry to China "to gain first hand information concerning conditions there, and also

as to the character, purposes and designs, domestic and international, of the political leadership of that Nation, and the potentialities and circumstances of trade between Red China and the United States" (J.A. 14-15).

The court below answered petitioner's "need to go" contention with the statement that petitioner's mere status as a Congressman "does not entitle him to be exempted from regulations or orders of the Executive Department in matters within the latter's constitutional competence" (p. 29, *infra*). The Court's statement is predicated on the two-fold assumption that the President and the President alone makes our foreign policy and that, in any event, the individual Congressman has no need or right for first-hand information unless authorized by the Congress or one of its committees. Both assumptions are erroneous. The Constitution lodges in the House of Representatives at least concurrent power to participate in foreign relations functions and this power is exercised not only by the House and its committees but by all of its members.

Current illustrations of power exercised by the House of Representatives in the area of foreign relations are legion. The United States is a member of the United Nations by virtue of the United Nations Participation Act, based not on the treaty-making power but on the national legislative power.[25] The North Atlantic Treaty had to be implemented by military support which means that "the House of Representatives was, and is, actively concerned with the whole North Atlantic Treaty structure."[26] A pertinent use by the Congress of its fiscal primacy to control and direct foreign policy occurred in connection with the State De-

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[25] Corwin, *The President: Office and Powers* (3d ed., 1948), p. 270.

[26] Richards, *The House of Representatives in Foreign Affairs*, Annals of the American Academy of Political and Social Science, Sept. 1953, p. 67.

partment Appropriations bill for 1954. Amendments were proposed which would cut off United States contributions to the United Nations in the event of the admission of Communist China.[27] Indeed, our basic policy towards China and Formosa remains predicated upon a Resolution of both Houses of Congress enacted in January, 1955, and Communist China is today a subject of continuing Congressional action.

The province of regulating foreign affairs is not confined to Congressmen serving on the Foreign Relations Committee. One commentator notes that "At least fifty public laws enacted in that session [the second session of the Eighty-second Congress] in the field of foreign relations were reported out of committees other than Foreign Relations and Foreign Affairs. Serving on those other committees were three-quarters of the membership."[28] Some of these committees are Ways and Means (which regulates tariffs), Banking and Currency (which through its ability to alter the value of the dollar can affect foreign trade), the Armed Services Committee (which determines the strength of the armed forces), the Committee on Agriculture (which recently played an important role in our relations with Cuba), the Public Works Committee (which authorized the St. Lawrence Seaway), the Committee on Merchant Marine and Fisheries (which constantly considers international issues), and the Interior and Insular Affairs Committee (which has responsibility for the future of the Pacific Islands). "Even the committees on the District

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[27] These amendments were withdrawn only after the President assured Congressional leaders that he would oppose vigorously any attempt to admit Communist China to the United Nations. Nobelman, *Financial Aspects of Congressional Participation in Foreign Relations*, Annals, n. 26, *supra*, p. 163.

[28] Cardozo, *Committees Touching Foreign Relations Indirectly*, Annals, n. 26, *supra*, pp. 84-85.

of Columbia find international considerations urged upon them in dealing with problems such as segregation."[29] Quite obviously, petitioner's own committee, the Committee on Post Office and Civil Service, has significant foreign affairs responsibilities: Its Post Office functions involve matters beyond our borders, including the significant current problem of admission of "propaganda" from Communist China through the mails, and its Civil Service functions follow our civil servants through the world.

The province of regulating foreign affairs is not confined to Committee action or sponsorship. Some of the most significant recent enactments on foreign policy were introduced as floor amendments by members who had not participated in prior Committee study and recommendations. Among such measures are the Battle Act, the Buy American Act and the Act requiring half the goods exported under economic aid programs to be shipped in United States flag vessels.[30]

A former ranking member of the Senate Foreign Relations Committee observes that the entire membership of the Congress participates in the formulation of foreign affairs. To be effective, it requires information and intelligence, and "If the Congress is to do an effective job under our system of checks and balances, it must not be completely dependent upon the executive branch in gathering its facts and figures."[31] Senator Allen J. Ellender remarked after a trip behind the Iron Curtain that the impressions he gained firsthand "differ sharply" from those he received from the State Department.[32] It was Secretary

[29] Griffith, *The Place of Congress in Foreign Relations*, Annals, n. 26, *supra*, p. 12.

[30] Cardozo, n. 28, *supra*, p. 88.

[31] Smith, *Information and Intelligence for Congress*, Annals, n. 26, *supra*, p. 119.

[32] N. Y. Times, Sept. 6, 1955, p. 4, col. 3.

Herter who, as a member of the House, led the first postwar Congressional group abroad to study conditions firsthand to better evaluate the need for Marshall Plan legislation. Members of this Herter group were chosen without regard to committee assignment.[33] The value of foreign travel as an adjunct to their Congressional function is increasingly recognized by Congressmen. Following the adjournment of the Eighty-second Congress, for example, 204 legislators made foreign study trips, thirty at their own expense.[34]

Petitioner is one of the Congressmen who has sought independent firsthand information by travel. Though he has no committee assignment bearing upon atomic energy, he traveled at Government invitation and expense to observe the 1958 nuclear tests in the Pacific. He has visited many of the troubled countries of Latin America and of Europe, where he has discussed foreign relations matters with representatives of various areas of the world, including China. Thus, for example, Congressman Porter had an extensive conversation in London in June, 1959, with the Second Secretary of the Chinese People's Republic's diplomatic delegation on subjects of concern to Communist China and the United States (see 105 Cong. Rec. 17634). These trips were quite obviously not tourist junkets. They were part of the informing function of Congress which this Court most recently emphasized and upheld. *Barenblatt* v. *United States*, 360 U.S. 109.[35] The information petitioner

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[33] Carnahan, *Congressional Travel Abroad and Reports*; Annals, n. 26, *supra*, pp. 122-23.

[34] *Id.*, p. 120.

[35] The Court was there concerned with a Congressional committee—the eyes and ears of the Congress; but no one has yet suggested that individual Congressmen cannot use their own eyes and ears to obtain the knowledge and opinion upon which is predicated their discussion and vote on the floor of the House.

gained on these travels was shared with his fellow Congressmen in floor discussion and committee testimony, and utilized in the introduction of bills and resolutions directly relating to our foreign policy.[36]

What petitioner's case adds to *Worthy* and *Frank* is the vital public need in the gathering of firsthand knowledge by conscientious legislators not content to rely on information served up by the Executive branch in support of its pre-determined policies and recommendations.[37] A Congressman's duties and responsibilities to his constituents and the nation are not confined to the area of his committee assignment.[38] We respectfully submit that there is no subject of pressing Congressional concern on which less firsthand information is available to the members of Congress than that on which petitioner seeks to obtain for himself and his colleagues.

The Government would indeed have a heavy burden to justify the impairment of so vital a public need for travel and information. But as we now show, far from sustaining that burden, the Government has here conceded away the very basis of its travel denials in *Worthy* and *Frank*, leaving no tenable justification for its action here.

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[36] See, e.g. H.R. 13854, 85th Cong., 2d Sess.; H.R. Con. Res. 297, 85th Cong., 2d Sess.; H.R. 4295, 86th Cong., 1st Sess.; H.R. 6682, 86th Cong., 1st Sess.; H.R. 7099, 86th Cong., 1st Sess.; H.R. Con. Res. 158, 86th Cong., 1st Sess.; H.R. Con. Res. 147, 86th Cong., 1st Sess.; H.R. Con. Res. 208, 86th Cong., 1st Sess.

[37] ". . . I think it can be safely said that the knowledge by the executive branch that it is coming up to Capitol Hill to testify before a committee some of whose members have made on-the-spot investigations of the matters to be covered by the testimony, acts as a salutary stimulus to the benefit of all concerned, especially the American people." Smith, n. 31, *supra*, p. 122.

[38] The court below refers to the fact that petitioner's travel was not authorized by Congress or a committee thereof. But petitioner's duties and responsibilities to his constituents and the nation flow from his constitutional office rather than from the action of Congress or any committee thereof.

2. *No Tenable Justification Has Been Advanced for the Government's Denial of Petitioner's Travel to China*

The primary justification for the travel ban in *Worthy* and *Frank*—the possible physical danger to the passport applicant and the international complications resulting therefrom—has no applicability here. The court below in *Worthy* repeatedly emphasized that it was the inability of our Government to protect American citizens in "danger" or in "trouble" which justified the Department's action there. The court referred to the Secretary's "determination that certain areas outside this hemisphere are trouble spots, or danger zones" and noted "the assistance the Congress requires the President to afford an American citizen in trouble abroad." Referring to Worthy as a "blundering inquisitor" with the "avowed intent . . . to seek especially stories that involve the risk of war," the court below found in that situation "grave danger involved in the wanderings of uninhibited American newsmen in China . . ." (see pp. 38 to 42, *infra*). In sum, the travel ban justification accepted by the lower court in *Worthy* was that American newsmen traveling in Communist China might be placed in trouble or danger there, creating serious international difficulties for our Government because of our limited ability to afford protection to citizens traveling in Communist China.

In sharp contrast, this consideration of danger or trouble in Communist China is totally inapplicable to Congressman Porter who would obviously be there under the solicitous protection of its government. On September 1, 1959, Mr. John W. Hanes, Jr., Security Officer of the Department of State, appeared to testify as the representative of the Department before a Special Subcommittee of the Committee on Government Operations of the United States Senate

holding hearings upon pending passport legislation. In the course of that hearing, at which the petitioner also appeared, Mr. Hanes stated:

> "I am using Mr. Porter as an example, since he has put himself forward as an example, if he traveled to Red China—incidentally, I am quite certain that the Communist Chinese would make very certain that nothing happened to him, because it would be to their propaganda advantage to see that nothing did. . . ." (R. 106).

Thus, unlike newsmen who might be abused or injured during their uninhibited wanderings in Communist China, the record contains a significant concession by the Department of State that the Chinese Communist Government itself "would make very certain that nothing happened to" Congressman Porter. Having conceded away the justification for the travel denials in *Worthy* and *Frank*, nothing remains here except the Government's contention that a Congressman's visit to Communist China might be misinterpreted as a basic change of foreign policy toward that country. Thus the Assistant Secretary's letter of denial states that Congressman Porter's "visit would be interpreted throughout Asia as well as by Communist China as a basic change in policy. . . ." (J.A. 11). And Mr. Hanes, testifying on this subject, stated that Congressman Porter's travel might "embarrass the United States in its foreign relations. . . ." (R. 106) and that the Congressman's visit "would be very widely interpreted throughout the world and particularly in the Far East and throughout South Asia as a change in policy of the American Government towards Communist China" (R. 99).

If we understand the Government correctly, it is saying that Congressmen must not be permitted to go to Commu-

nist China in pursuance of their legislative functions because, whether the policy of denying travel to China was initially right or wrong, its modification at this time through permission to Congressmen to travel there might be misinterpreted abroad as a change in American policy.[39] We find it difficult to believe that the Department of State is wholly powerless to make clear that the allowance of Congressional travel does not mean a new policy vis-a-vis the Government of China, but simply amounts to an acceptance by the Executive of the need for an informed legislature. In any event, the mere possibility of a misinterpretation of the issuance of an unrestricted passport is far

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[39] It is worthy of note that the Department's attempt to justify passport restrictions on the basis of a real or fancied "foreign policy" consideration runs counter to the development in the rest of the free world. The modern system of compulsory passports was developed in the 16th and 17th centuries by the more or less benevolent European tyrant to prevent his subjects from "becoming infected with foreign and new, and hence presumably dangerous, ideas." Parker, *The Right To Go Abroad*, 40 Va. L. Rev. 853 (1954). The French Revolution brought about a more widespread application and stricter organization of the compulsory passport system as a technique of national defense. *The Right To Travel*, *supra*, n. 2, pp. 165-166. By World War I, the passport system was abolished in all European countries but Russia, Turkey, and parts of the Austrian empire. During the period between the two world wars, some of the totalitarian states again adopted a compulsory passport system. Parker, *supra*, at p. 856. A compulsory passport system was, however, denied validity in the democratic countries. It was Hans Kelsen, then judge of the Constitutional Court, who denied the Austrian republic power to ban journeys to Russia which the Chancellery believed were made "for purposes of a propaganda that appears to endanger the public tranquility and order and eventually the safety of this state." *Id.*, at 863. Since the end of World War II, the nations newly emerging from former dictatorships as well as the nations newly emerging from colonialism have uniformly protected the freedom of travel by constitutional provision. Vestal, *Freedom of Movement*, 41 Iowa L. Rev. 6, 13 (1955). See also Article VIII of The American Declaration of the Rights and Duties of Man, adopted in Bogota in 1948, and Article XIII of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in the same year.

too thin a reed on which to base so significant a denial of private and public rights. The possibility of an erroneous public impression has never before been permitted to veto the constitutional rights of the citizen or the constitutional duties and responsibilities of the Congress and its members.

If Members of Congress may be denied Communist China travel merely because of the possible misinterpretation of their presence there, the Secretary might just as well preclude Congressmen from visiting Cuba or the Dominican Republic. There is no major governmental agency that does not feel on numerous occasions that what members of Congress do and say in various places has some unfavorable consequences, but this has never before been thought to justify Executive infringement upon the prerogatives of Members of Congress. The Secretary of State is no more justified, because of a supposed misunderstanding abroad of the significance of Communist China visits by Congressmen, to forbid such visits, than the Congress would be justified in restricting the foreign travels of the Secretary of State, which on occasion have been viewed with equal disfavor.

Conclusion

What we have here is a subordinate official of the Department of State exercising power wholly unauthorized by Congress or the President (Point I) on the basis of the fancied necessities of foreign relations (Point II). Such unauthorized and arbitrary action becomes doubly significant when applied to the right of a citizen Congressman to obtain firsthand information about a nation rapidly emerging as a dominant world power. The far reaching abridgement of the right to travel, presented here in sharpest focus, calls for review by the highest court of the land.

For the foregoing reasons it is submitted that the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion and Judgment of the United States District Court for the District of Columbia

The Court: There is no need to make any reservations for future time. I am prepared to decide this case immediately.

First of all, I believe it is governed by the Frank case and the Worthy case. You are asking this Court to interfere with the Executive function of the foreign policy of the United States; that is number two; and number three, you are asking, in the circumstances, that an ordinary citizen, who happens to be a Congressman, not traveling on official congressional business, be granted a passport when the Secretary of State concludes it would be to the best interests of the country not to do so.

* * * * * * * *

ORDER

This cause having been heard on Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment, and the Court having considered all of the record, the pleadings, affidavits, exhibits and memoranda of Points and Authorities filed herein and there having been a full and complete hearing and the Court having found that there is no genuine issue as to any material fact and that the Defendant is entitled to judgment as a matter of law.

Therefore it is now ORDERED by the Court on this 30th day of September, 1959 that Defendant's Cross-Motion for Summary Judgment be, and the same is hereby granted, and that Plaintiff's Motion for Preliminary Injunction and Motion for Summary Judgment be, and the same are hereby denied and the complaint be and the same is hereby dismissed, with costs to Plaintiff.

(s.) MATTHEW F. McGUIRE,
Judge.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15394

CHARLES O. PORTER, APPELLANT,

v.

CHRISTIAN A. HERTER, Individually and as Secretary of State, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided April 14, 1960

Mr. Joseph L. Rauh, Jr., with whom *Mr. John Silard* was on the brief, for appellant.

Mr. Kevin T. Maroney, Attorney, Department of Justice, for appellee. *Mr. George B. Searls*, Attorney, Department of Justice, also entered an appearance for appellee.

Before MR. JUSTICE BURTON, retired,* and DANAHER and BASTIAN, *Circuit Judges*.

PER CURIAM: Appellant is a member of Congress representing the 4th Congressional District of the State of Oregon. On August 7, 1958, a passport was issued to him upon which appeared the following: "This passport is not valid for travel to the following areas under control of authorities with which the United States does not have diplomatic relations: Albania, Bulgaria, and those portions of China, Korea and Viet Nam under Communist control." On June 10, 1959, he applied to the Department of State for permission to visit Red China, asserting "A member of Congress has a right to go anywhere in the world to do his duty as a U. S. legislator as he sees it, except in time of

* Sitting by designation pursuant to 28 U.S.C. § 294(a).

war or emergency. Any other policy would seem to be an unconstitutional breach of the separation of powers." Appellant's application was denied.

Appellant then instituted his suit in the District Court asserting that the Secretary's action was in violation of appellant's rights under the Passport Act of 1926[1] and the Constitution of the United States. He asked for an injunction to restrain the Secretary from withholding passport facilities and for other relief, and for an order compelling the Secretary to remove the limitation upon appellant's use of the passport for travel to China. He sought summary judgment, but the District Court granted the Secretary's cross motion for summary judgment and dismissed the complaint. This appeal followed.

The record before us demonstrates that appellant as a member of the Committee on Post Office and Civil Service in the House of Representatives had been authorized to travel in behalf of the Committee and in an official capacity to Okinawa and Japan to investigate personnel problems of overseas employees.

He had no comparable authorization from Congress or from any of its committees to travel in Communist China. Although he is a member of Congress, that status alone does not entitle him to be exempted from regulations or orders of the Executive Department in matters within the latter's constitutional competence. We do not have before us a conflict between the legislative and executive branches of the Government in the course of which the respective branches assert and seek to apply opposing constitutional claims. The issue here is merely between a claim of an inherent right asserted in his individual capacity by a member of the legislative branch, and the plenary power of the executive branch asserted by it in relation to and in its conduct of the Nation's foreign affairs.[2] Under such circum-

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[1] Act of July 3, 1926, 44 STAT. 887, 22 U.S.C. § 211a (1958).

[2] See Exec. Order No. 7856, 3 FED. REG. 681, 687 (1938), as codified in 22 C.F.R. § 51.75 (1958); cf. 8 U.S.C. § 1185 (1958), Proclamation No. 3004, 18 FED. REG. 489 (1953) and 22 C.F.R. §§ 53.1-7 (1958).

stances the individual Congressman must conform to the regulations pertaining to passports which apply to all citizens and which have been authorized by the branch of the Government having jurisdiction over the subject.

Viewed in this light, appellant's rights are subject to the considerations discussed in *Worthy* v. *Herter*, —— U.S.App.D.C. ——, 270 F.2d 905, *cert. denied*, 361 U.S. 918 (1959), and *Frank* v. *Herter*, —— U.S.App.D.C. ——, 269 F.2d 245, *cert. denied*, 361 U.S. 918 (1959). We deem the principles announced in those cases to be controlling here.

Accordingly, the judgment of the District Court is

Affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14806

WILLIAM WORTHY, JR., APPELLANT,

v.

CHRISTIAN A. HERTER, Secretary of State, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided June 9, 1959

Mr. William M. Kunstler, with whom *Mr. Walter E. Dillon, Jr.*, was on the brief, for appellant.

Mr. F. Kirk Maddrix, Attorney, Department of Justice, with whom *Mr. Samuel L. Strother*, Attorney, Department of Justice, was on the brief, for appellee.

Before MR. JUSTICE BURTON, Retired,* PRETTYMAN, Chief Judge, and WILBUR K. MILLER, Circuit Judge.

PRETTYMAN, *Chief Judge*: Our appellant, William Worthy, Jr., was a newspaperman duly accredited by the *Afro-American* Newspapers, the *New York Post*, and the Columbia Broadcasting System. In 1957 he applied for a renewal of a passport originally issued to him in 1955. The passport contained a restriction stating it was not valid for travel to five named areas under control of authorities with which the United States does not have diplomatic relations, including the portions of China, Korea and Viet Nam under Communist control; and also a restriction against travel in Hungary. After various proceedings Worthy was asked whether he would make a commitment to abide the restrictions. He declined to do so, and the renewal was refused. The background for the refusal was that when the pass-

* Sitting by designation pursuant to Sec. 294(a), Title 28, U. S. Code.

port was originally issued it contained the same restrictions but Worthy nevertheless traveled extensively in both Communist China and Hungary. The refusal of the passport rested in no part upon Worthy's personal beliefs, writings or character. It was an application of the Secretary of State's general policy of refusing Government sanction to travel by United States citizens in certain areas of the world, presently under Communist control and deemed by him to be trouble-spots.

We note immediately that the point here presented in no wise resembles the matter decided by the Supreme Court in *Kent* v. *Dulles*.[1] There the Court held that the Secretary refused passports because of the beliefs and associations of the applicants and that he had no statutory authority to refuse on such grounds. In the case at bar no beliefs, associations, or personal characteristics are involved. Nor is this a case in which the Secretary has proposed a restriction upon a passport for reasons of internal security, *i.e.*, protection against internal subversion. The factors here are political and military conditions in certain areas of the earth.

Worthy makes four points. 1. He says the right to travel is a constitutional right and may be abridged only when there are overriding considerations of the public safety. 2. The Secretary lacks statutory authority to deny a passport to prevent travel in these countries. 3. Alternatively, to the extent the refusal rests upon Executive power over foreign relations, it is still subject to applicable constitutional provisions, and the reasons given by the Secretary do not warrant this abridgment. 4. The refusal is an abridgment of the freedom of the press.

Worthy says, correctly, that the denial of a passport, under the statutes of today, must be justified as a denial of a right to travel; and he says, also correctly, that the right to travel is protected by the Constitution, being a part of the right to liberty. But the simple, succinct phrases of the Bill of Rights, indestructible protections to some of the fundamentals of our way of life, can be,

[1] 357 U.S. 116 (1958).

and often are, expanded by rhetorical inflation beyond all semblance to the realities with which they were meant to deal. The right to travel is a part of the right to liberty, and a newspaperman's right to travel is a part of the freedom of the press. But these valid generalizations do not support unrestrained conclusions. For the maintenance and preservation of liberty, individual rights must be restricted for various reasons from time to time. In case of a clear and present danger to the national security, even so generally unrestrictable a right as speech can be restricted. In case of a reasonably anticipated threat to security, or to law and order, many acts by individuals can be restricted. An assembling mob bent on disorder can be dispersed. A man with a contagious disease can be locked in his house. Potentially dangerous actions must be restricted in order to prevent harm to others. So we have sanitation, fire, building and speeding regulations.

Liberty itself is inherently a restricted thing. Liberty is a product of order. There is no liberty in anarchy or in chaos. Liberty is achieved by rules, which correlate every man's actions to every other man's rights and thus, by mutual restrictions one upon the other, achieve a result of relative freedom. The mere day-to-day maintenance of the order which insures liberty requires restrictions upon individual rights. Some actions, neither harmful nor potentially dangerous, must be restricted simply for the sake of good order in the community. So we have parking, traffic, and zoning regulations and rules of court.

No individual may take whatever he pleases, and so all others are free to enjoy their possessions. One man may not assault another with whom he disagrees, and this restriction protects the freedom of all to speak and live peacefully. One may not spread vicious lies about another, and so all are free to enjoy their good reputations. Every person is forbidden to join with his competitors to drive another person out of business, and so all are free to pursue their trades and buy products at reasonable prices. Everybody's liberty is restricted by prohibitions against driving recklessly, spreading disease, and leaving hidden dangers

on property, and so the whole community is free to enjoy health. One cannot trample his neighbor's flower beds, or even trespass on his lawn. Even in a neighborhood community every man's right to roam is drastically restricted. A man who asserts his own uninhibited freedom to go where he pleases is a menace and is quickly put in his place. He may not park where he pleases, or drink where he pleases, or spit where he pleases. In the community the police take care of these matters, and in so doing the officers act as servants of the rest of the community; they are the government.

Freedom to worship as each one chooses is restricted in some ways. Worship by human sacrifice is forbidden. A member of one religion cannot interrupt the services of another religion in order to worship in his own way. Through this restriction all have freedom to worship as they choose.

Freedom of the press bears restrictions. It does not include the right to publish what another has registered with the copyright office. Merely because a newsman has a right to travel does not mean he can go anywhere he wishes. He cannot attend conferences of the Supreme Court, or meetings of the President's Cabinet, or executive sessions of Committees of the Congress. He cannot come into my house without my permission, or enter a ball park without a ticket of admission from the management, or cross a public street downtown between crosswalks. He cannot pass a police cordon thrown about an accident, unless he has a pass from the police. A newsman's freedom to travel about is a restricted thing, subject to myriad limitations.

The peace-loving have rights. Those who recognize the fundamental necessities of liberty as a delicate product of order have power to protect themselves and their liberty. The liberty of everyone, law-abiding citizen and criminal alike, is involved in the maintenance of order and is threatened when disorder brings either the necessity or the opportunity for force to replace correlated rules of conduct. Such a threat may easily arise from conditions

in foreign lands. The people have a right to protect their liberty, no matter whence the threat.

Indeed it is quite clear that those who cry the loudest for unrestricted individual freedom of action would be the loudest in bemoaning their fate if their plea were granted. The same release from constituted authority would set free persons so powerful, so ruthless, so bent on autocratic control that no newsman would have any liberty whatever. The customary prompt transformation of unrestrained liberty into dictatorship is one of the poignant lessons of history. These pleas for unrestricted individual freedom seem to us to be made upon a firm assumption that not too many people will be granted such liberty and not too much liberty in any event. Worthy himself says he does not plead for an unrestricted liberty for all people. His plea is for his own liberty to do what he happens to choose.

So we conclude on the point that the right to travel, like every other form of liberty, is, in our concept of an ordered society, subject to restrictions under some circumstances and for some reasons.

The next questions are what restrictions are here sought to be imposed by the Secretary and why he seeks to impose them.

Worthy seeks an unrestricted passport, so that he may travel anywhere in the world. He wishes especially to enter certain countries, now under Communist control, which, like most others, require him to possess a valid United States passport. He advised the Board of Passport Appeals he had written Premier Chou En-lai that he sought "full information about any and all news stories, specially stories that involve the risk of war, as is the case with current Chinese-American issues over Taiwan, Quemoy and Matsu." The Secretary will not issue him a passport unless Worthy says he will not enter these designated countries. Thus Worthy is now free to travel in public places in the United States, Canada and Mexico, and if he agrees to the restrictions he will be free to travel in places open to foreigners in all countries which

will grant him visas, except those named by the Secretary. The quantum by which Worthy's freedom has been reduced is the area of places open to foreigners in those of the six named countries which might grant him visas. No restrictions are proposed upon Worthy's thinking or writing. The restrictions proposed are on his physical presence in specified zones in foreign countries. They are restrictions upon acts, *i.e.*, travel.

The Secretary has given two separate but related reasons for this reduction of Worthy's freedom: (1) The areas named are potential or actual "trouble-spots", where the presence of American citizens may place them in danger and further irritate our relations with the named countries and their allies. (2) The presence of American citizens in these areas and the official approval of their presence there will impede the execution of American foreign policy in relation both to these countries and to other countries.

The facts which caused the Secretary to designate these places and to refuse official sanction of travel therein are shown us by the Secretary. Indeed they are established by many current events; they appear almost daily upon the front pages of the newspapers; they have been declared repeatedly by the President, his predecessors, and the Congress. We need not catalog them. The Korean difficulty with Communist China is still in the armistice stage, not finally settled. All trade with that part of China is prohibited. The situation in respect to Formosa and the small offshore islands, where we have a treaty of mutual defense, fluctuates in tensity. We oppose Communist China's membership in the United Nations. American citizens are held in hostage in that country. The reasons underlying the restriction on travel in Hungary are less numerous but amply sufficient. Unless almost the whole of our foreign policy and the titanic domestic burdens being presently borne by our people are devoid of factual foundation, there is presently in the world a deadlock of antagonistic forces, susceptible of erupting into a fatal cataclysm. The capacity of incidents arising from the conduct of individuals to ignite that conflagration is well proven. Worthy says the reasons averred by or available to the Secretary

are insufficient to support the restriction of his passport. We hold they are ample.

Designations of restricted areas are made from time to time by the Secretary and thereafter are frequently withdrawn by him. Such has been a customary practice. For example, travel to Hungary was restricted on December 21, 1949, and the restriction was lifted upon the release of Robert Vogeler. The same thing happened in Czechoslovakia in 1951 in connection with the Oatis incident.

We think the designation of certain areas of the world as forbidden to American travelers falls within the power to conduct foreign affairs. The bare determination that certain areas outside this hemisphere are trouble spots, or danger zones, is a phase of "foreign affairs". Such a determination involves information gleaned through diplomatic sources and channels, and a judgment premised in large part upon foreign policy. The grounds upon which the President would make such a designation are foreign considerations, foreign affairs and policy. Indeed it would seem that such a restriction is in and of itself a foreign policy. It is at least an instrument of foreign policy. It depends upon this Government's attitude toward a foreign power and on that power's attitude toward us. Its locale is foreign territory. The assistance the Congress requires[2] the President to afford an American citizen in trouble abroad is a phase of "foreign affairs". The instrumentalities he must use to fulfill the congressional mandate are diplomatic, or foreign-service consular. A decision on the part of the President to prevent, if possible, the necessity

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[2] 22 U.S.C.A. § 1732: "Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress."

for calling into play his diplomatic instrumentalities and the use of his powers—persuasive or compulsory—upon a foreign nation is a phase of "foreign affairs". The selection by him of the means to be used in a given such case rests in large part upon policy, obviously foreign policy.

If then, the designation of a foreign area as a potential trouble spot is a "foreign affair" and the extrication of a citizen from trouble in a foreign country is a "foreign affair", is the refusal of the Executive to accord Government approval for a citizen to travel in such a designated area also a "foreign affair"? We think it is. The essence of the conduct of foreign affairs is the maintenance of peace, the prevention of war. The Constitution places that task of prevention in the hands of the Executive. The two correlative powers, to conduct war and to prevent war, are Executive functions under our Constitution.

Of course the prevention of clashes with foreign governments embraces diplomatic negotiations with those governments. But, as a matter of hard, practical reality, it also involves restrictions upon acts of our own citizens which may reasonably be foreseen as breeding clashes. History establishes that either the behavior or the predicament of an individual citizen in a foreign country can bring into clash, peaceful or violent, the powers of his own government and those of the foreign power. This is a fact, not a theory. The nub of the problem at bar revolves about a fact, not a suppositious theorem. The acts of individuals do cause clashes; the prevention of such acts does prevent clashes. Such clashes, whether diplomatic or military, involve "foreign affairs". The plight of airmen who have crossed borders, and the tense crises thereby created, are recent common knowledge. Surely the Executive can forbid such crossings by our airmen, commercial or private as well as military.

We think that, if the Executive foresees that the presence of American citizens in a designated foreign area may, by reason of military or political conditions there, evolve into, or be the occasion of, a clash, diplomatic or military, with a foreign government, his power in respect to foreign affairs includes power to refuse to sanction

the travel of American citizens in that area. To hold the contrary would be to hold that the protection of the peace against American-caused incidents in foreign countries is outside the realm of foreign affairs. Such latter holding would be both illogical and unrealistic. In foreign affairs, especially in the intimate posture of today's world of jets, radio, and atomic power, an individual's uninhibited yen to go and to inquire may be circumscribed. A blustering inquisitor avowing his own freedom to go and do as he pleases can throw the whole international neighborhood into turmoil. Worthy's avowed intent is to seek "especially stories that involve the risk of war".

The general principles governing the power of the Executive in foreign affairs are discussed by the Supreme Court in *Perez* v. *Brownell*;[3] *Chicago & Southern Air Lines* v. *Waterman Corp.*;[4] and *American Communications Ass'n* v. *Douds*,[5] especially in Mr. Justice Jackson's concurring opinion.[6] We dealt with them at length in *Bricht* v. *Dulles*.[7] We think we need not here venture upon another extensive examination of that phase of our problem. It is settled that in respect to foreign affairs the President has the power of action and the courts will not attempt to review the merits of what he does. The President is the nation's organ in and for foreign affairs.[8]

Worthy says that a denial of the right to travel to certain places cannot be based on consideration of foreign policy, because foreign policy is vague and fluctuating. This contention ignores the President's undisputed power to abridge various other rights on foreign policy grounds. The President may recognize foreign governments,[9] make executive agreements,[9] and grant, deny or

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[3] 356 U.S. 44 (1958).

[4] 333 U.S. 103 (1948).

[5] 339 U.S. 382 (1950).

[6] *Id.* at 422.

[7] 101 U.S. App. D.C. 239, 248 F.2d 561 (1957).

[8] Chicago & Southern Air Lines v. Waterman Corp., 333 U.S. at 109, 111.

[9] United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

modify licenses for international air transportation. When the President exercises his authority in any of these fields, his decision may seriously affect the freedom of an American, "outside areas of plainly harmful conduct, * * * to shape his own life as he thinks best, do what he pleases, go where he pleases." [10]

The nature of the power of the President in the conduct of foreign affairs is well illustrated by the *Waterman* case, *supra*. The President's order to modify a license for overseas air transportation was in accordance with Section 601, Title 49, United States Code. That section provides that such licenses "shall be subject to the approval of the President." Congress laid down no standards or guide for him to follow. The President's justification for the change was that he had reached his decision "because of certain factors relating to our broad national welfare and other matters for which the Chief Executive has special responsibility * * *." [11] The Supreme Court held that the President's decision was guided by his foreign policy and was immune from judicial review. The dissenting Justices agreed with this proposition but thought that procedure before the Civil Aeronautics Board should be reviewable.

Worthy argues that the Secretary does not have statutory power to designate restricted geographical areas. We think, as we have indicated, that the President has ample power under the Constitution itself. His delegation to the Secretary is complete.[12] But, if the power to act rests upon statutes, we think the existing ones are clearly sufficient. Section 1185(b), Title 8, United States Code,[13] provides that, while a proclamation of national emergency is in force,[14] "it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and pre-

[10] CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 (1956), p. 197, quoted in Kent v. Dulles, 357 U.S. at 126.

[11] 333 U.S. at 111.

[12] Proc. No. 3004, 67 STAT. C31 (1953); Exec. Order No. 7856, 3 FED. REG. 681 (1938).

[13] 66 STAT. 190 (1952).

[14] See Proc. No. 3004, *supra* note 12.

scribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport." The President delegated this authority to the Secretary by Proclamation No. 3004.[15] On this point we appeared, in *Briehl* v. *Dulles*, *supra*, to be in agreement. In his dissenting opinion Judge Bazelon said, referring to Proclamation No. 3004: "Thus read, it grants the Secretary discretion of the type already exercised in his existing travel control regulations; namely, to determine which parts of the world can be visited by Americans only if they have passports, but not to determine which Americans are to receive passports."[16] The 1926 Act contained the unequivocal provision: "The Secretary of State may grant and issue passports * * *."[17] The Supreme Court said in *Kent* v. *Dulles*:[18]

> "Under the 1926 Act and its predecessors a large body of precedents grew up which repeat over and again that the issuance of passports is 'a discretionary act' on the part of the Secretary of State. The scholars, the courts, the Chief Executive, and the Attorneys General, all so said."

If the Secretary has any discretion it seems to us it must include a discretion to prevent trouble when he reasonably foresees trouble. Without a preventive discretion, he has no discretion of any realistic content. Reasonable basis for the Secretary's anticipation of possible involvement appears in ample measure in this case. So we think the statutes, if they have any meaning at all, include the power to do what the Secretary did in the case before us.

The *in terrorem* argument that to sustain the Secretary's power in this case is to confer upon him an unrestricted discretion to grant or to refuse passports is wholly unimpressive. He has not exercised such a discretion. He does not claim it, and we are not considering

[15] *Ibid.*
[16] 101 U.S. App. D.C. at 259, 248 F. 2d at 581.
[17] 44 STAT. 887, 22 U.S.C.A. § 211a.
[18] 357 U.S. at 124-125.

any such power in the remotest degree. The claimed power, so far as this case is concerned, is narrow and clearly delineated.

It is said that many of the incidents involved in the reported court cases dealing with foreign affairs were in time of war. But foreign affairs involve more than wars, and the President's powers over foreign affairs are not only war powers. As a matter of fact these are two separate powers in the Constitution. And, as a further matter of fact, governments have many more dealings with each other and problems concerning each other in peacetime than they do in wartime. Not only so, but, as we have already emphasized, the duty of the President to prevent war is as important as is his power to conduct one.

Worthy errs when he assumes that the Secretary has forbidden him to travel at all or that the action "is tantamount to imprisoning him." Worthy, so far as this record shows, can have a passport to travel all over the world except in certain designated areas. He is in no sense imprisoned, except in the same rhetorical sense, although in less degree, that man is imprisoned because he is earthbound.

Worthy says situations which demand curtailment of constitutional rights must be of an exceptional and severe emergency nature—"clear and present danger", "gravest imminent danger", etc. Several comments may be made. In the first place the nature of the right and the nature of the restriction are important. As we have already pointed out, the right here involved is not a right to think or speak; it is a right to be physically present in a certain place. The basis of the restriction is not personal but is the military and political situation in the designated areas. In the second place there is a grave, clear and present danger, as we have indicated. When a gunman points a loaded gun, one need not await the report from a shot to know that danger is clear and present. The contention that there is no grave danger involved in the wanderings of uninhibited American newsmen in China or in Hungary today reflects an unawareness of realities. In the third place the Constitution puts in the President the

authority to evaluate the military and political exigencies in foreign countries. The courts are the least able of all organs of government to make such evaluations, and they are wholly without authority to make them.

Worthy says the presence of Americans, at least of American newsmen, in the restricted areas would better our foreign relations rather than worsen them. This is an argument he should make to the President or the Congress. The authority to determine what would and what would not better our foreign relations is not vested in individual citizens, even though they be newsmen, any more than authority to declare a damaged wall in a newsman's home town dangerous or not dangerous is vested in him. The Fire Chief determines that condition and enforces his conclusion.

To order the Secretary of State to do something, because we believe it would be better for our foreign relations than his plan, would be a gross usurpation of Executive powers. Judgment on what course of action will best promote our foreign relations has been entrusted to the President, not to the courts, journalists, scholars, or even "public opinion". He makes his decision with the aid of the Department of State, a large organization with stations throughout the world, as well as on the basis of information received from all other parts of the Executive branch. We, if we had all this information, might reach a different decision. But the Constitution has wisely placed that burden in the hands of one who must justify his decisions before the electorate.

The judgment of the District Court is

Affirmed.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15059

WALDO FRANK, APPELLANT

v.

CHRISTIAN A. HERTER, Secretary of State, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided July 6, 1959

Mr. Leonard B. Boudin, with whom *Mr. David Rein* was on the brief, for appellant.

Mr. F. Kirk Maddrix, Attorney, Department of Justice, with whom *Messrs. Samuel L. Strother* and *Anthony F. Cafferky*, Attorneys, Department of Justice, were on the brief, for appellee.

Before BAZELON, FAHY and BURGER, *Circuit Judges*.

PER CURIAM: The questions involved in this case were necessarily decided by this court in *Worthy* v. *Herter*, —— U.S. App. D.C. ——, —— F.2d —— (June 9, 1959). On the authority of that decision the judgment of the District Court granting the motion of the Secretary for summary judgment, denying appellant's motion for summary judgment, and dismissing the complaint, is

Affirmed.

BURGER, *Circuit Judge, concurring:* I do not think this court in *Worthy* v. *Herter*, No. 14806, —— U.S.App.D.C. ——, —— F.2d —— (June 9, 1959), reached or was confronted with an important issue here presented by appellant. That issue was whether, conceding the Secretary's power to limit travel to Communist China, the formula and criteria prescribed for the selection of a limited number of news correspondents were unconstitutionally discriminatory as to this appellant.

Appellant is the holder of a duly issued passport from the Secretary of State which contains a provision:

> "This passport is not valid for travel to the following areas under the control of authorities with which the United States does not have diplomatic relations: Albania, Bulgaria and those portions of China, Korea and Viet-Nam under Communist control."

On application of appellant the Secretary of State declined to remove the restriction against travel to Communist China.

In support of his complaint seeking removal of the travel restraint clause as to Communist China and to enjoin the enforcement of sanctions against him, appellant makes various contentions: (1) that the Secretary of State has no statutory authority to prevent United States citizens from traveling to the China mainland by so restricting travel and by threatening to invoke civil and criminal sanctions for violation of restrictions; (2) that these travel restrictions are a violation of appellant's First Amendment rights of free speech and press and a deprivation of his right to earn a living by activities requiring travel; additionally that he has been denied due process under the Fifth Amendment; (3) that the Secretary's action in granting travel rights to 25 or 30 representatives of various news services while denying the same rights to appellant individually is an unreasonable discrimination in violation of due process under the Fifth Amendment.

Appellant's pleadings describe him as a writer, scholar and teacher who has lectured here and abroad and who writes for 20 Latin American papers. Appellant asserts he has an invitation to lecture at the University of Peking, capital of Communist China, for "early 1959" and that early resolution of his rights is important to him.

The Secretary of State responds, as he did in *Worthy* v. *Herter*, *supra*: (1) that an essential feature of United States policy toward world Communism generally and Communist China in particular is to withhold recognition,

de facto and *de jure*, of that regime; (2) that in the implementation of that policy travel of United States citizens to the China mainland, among other places under Communist control, has been prohibited; (3) that the Executive's power to conduct foreign affairs springs from the inherent powers of a sovereign, confirmed by the Constitution and that this power has been implemented by joint action of the President and Congress in statutes; (4) that in implementation of its policy, the Secretary has recently developed a formula to permit a limited number of news gathering agencies to designate representatives to receive passports to Communist China, the agencies being selected on the basis of established past interest in foreign news coverage.

The first two contentions of appellant are disposed of by our decision in *Worthy* v. *Herter*, and since that is dispositive no extended discussion of those issues is needed. The reasoning in the *Worthy* case seems to me unassailable, and I would reach the same conclusion on the first two points raised in this case for essentially the same reasons as set out so clearly in that case by Chief Judge Prettyman.

The challenge to the Secretary's action as being discriminatory is, however, not necessarily controlled by the *Worthy* case and I now deal with that issue separately, as I think must be done.

It is axiomatic that the conduct of foreign affairs necessarily involves flexible measures and policies which can be adjusted to meet changing conditions. Just as Communist China altered its former rigid policy of admitting no American newsmen, this country must be free to alter its policies in that connection if those in charge of these purely political decisions think it is in the interest of the United States to do so. There is always risk that the Communist regime may try to make hostages of these Americans, as the Communists have so often done in Hungary, Yugoslavia and are now doing in Communist China. This is a calculated risk and to the extent permitted it should be allowed only in the discretion of

those in possession of information such as the Secretary has. No American is *sent* there and those who seek to go take whatever risks are involved.

In the implementation of our foreign policy and especially in relation to Communist China, the State Department recently concluded that a limited number, approximately 40, news representatives would be permitted to go to the Chinese mainland, on an experimental and temporary basis, provided the forces in control of that area would receive them. This threshhold decision is political in the highest sense and is not reviewable on any basis in any circumstance by any court. Obviously, judges have neither the information essential to evaluate such a decision nor the competence and experience to appraise the information even if by chance it should be made available to them. Courts have no more occasion or power to inquire into such decisions than the State Department would have to inquire into the time allowed for oral argument or the length of printed briefs on appeals on this court.

The second phase of the Secretary's decision, that dealing with the manner of selection of the correspondents to be afforded travel privileges to China's mainland, however is not similarly immune to judicial review. It is reviewable for, among other things, arbitrariness which would render the basis of the choice discriminatory. If, for example, the choice was limited only to Democrats or only to Republicans, obviously that would be improper and would fail. But judicial review even of the formula of selection is narrow and it is limited to determining whether the basis of the choice bears some rational relationship to the ends to be served. The distinction made between news agencies with a demonstrated interest in foreign news coverage and individual reporters must have some relevance to the purpose to be achieved. *Ct. Carroll v. Wallace*, 306 U.S. 1 (1939); *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949); *Hartford Carbon, Inc. v. Ten Eyck*, 297 U.S. 266, 274 (1936) (Cardozo dissenting); *Stanley v. Public Util. Comm'n*, 295 U.S. 76

(1935); *Murphy* v. *California*, 225 U.S. 623 (1912); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911); *Watson* v. *Maryland*, 218 U.S. 173 (1910).

The Secretary invited each news gathering agency with a demonstrated interest in reporting foreign news to apply for leave to go to the China mainland. Specifically he set as an eligibility criterion the maintenance of at least one full-time correspondent overseas. The invitation went, on this basis, to 40 or more news agencies. We are told 30 such agencies made application and that only one correspondent designated by a news agency has been granted leave to enter mainland China by the forces in control of that area.

Of course, the fact that the Communists might possibly try to exercise a careful choice of United States newsmen thought by them to be friendly to Communism, or "neutralist" in their sympathies would not necessarily justify our Government in using an individual's established and demonstrated hostility to Communism as the sole criterion for its selection of the 40 American newsmen. But even the probability that the Communists will try to secure some advantage out of admitting American news reporters to the mainland emphasizes the strictly political nature of the entire problem.

Our Government has decided to try out this program of allowing some news correspondents to go to Communist China on an "experimental and temporary basis" because presumably, as a calculated risk, in the conduct of foreign affairs it may help our ultimate objectives of world peace and stability, reduction of tensions, and resistance to Communism. In such an experiment the political branches of the government must be allowed wide latitude in carrying out its policy.

It can be assumed that appellant possesses the qualifications to observe, interpret and report events on China's mainland. But obviously the Secretary could not permit every United States citizen so qualified to travel to Communist China in light of complex political factors so well described by Judge Prettyman in *Worthy* v. *Herter*. Nor can it be said that every news-

paper in the United States could send one reporter. Simply as a matter of numbers, a line must be drawn somewhere. The foreign policy considerations give the Secretary wide latitude in drawing a line and defining criteria.

It has been pointed out that having failed to achieve traditional diplomatic recognition from the United States, Communist China has for years carried on a program and policy of "people's diplomacy" with private, unofficial contacts and exchanges designed to achieve on an unofficial basis that which, as a matter of deliberate national policy we have denied it. At stake are vast interests not the least of which is a possible seat in the Security Council of the United Nations. Here again, the correctness of our policy of thus frustrating Communist objectives is not open to judicial scrutiny any more than would be the defense plans of the Joint Chiefs of Staff or the decision to abandon or not abandon aircraft carriers in favor of some other weapon.

Our duty is not to decide whether the Secretary of State has developed the best formula and criteria for this "experimental and temporary program" of allowing a limited number of news correspondents to go to a previously proscribed area, or whether 40 is the correct number, but simply whether he has exceeded his authority in acting as he has thus far, as shown by this record.

I agree, first, with the holding that the Secretary has not exceeded his powers as defined in *Worthy* v. *Herter*, and second, I would hold explicitly (as my colleagues do by implication) that the formula and criteria established for the selection of the "limited number" of representatives of news gathering agencies are not discriminatory in the sense urged by appellant.[1]

[1] The Secretary's brief tells us that if one of the news gathering agencies which meets the standards prescribed should designate appellant as its correspondent, he may go to the mainland of China if he can get in.

APPENDIX D

22 U.S.C. § 211(a)

The Act of July 3, 1926, 44 Stat. 887, 22 U.S.C. § 211 (a) provides, in pertinent parts, as follows:

> "The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the Chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports."

Extract from 8 U.S.C. § 1185

Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U.S.C. § 1185, as codified, provides in pertinent part:

> "§ 1185. Travel control of citizens and aliens during war or national emergency—Restrictions and prohibitions on aliens.
>
> (a) When the United States is at war or during the existence of any national emergency proclaimed by the President, * * * and the President shall find the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—
>
> (1) (There follow restrictions enumerated (1) through (7) not here pertinent.)
>
> (b) After such proclamation as is provided for in subsection (a) of this section has been made and pub-

lished and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

Extract from Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C. 31

"Whereas Section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President * * * and when the President shall find that the interests of the United States so require; and

Whereas the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

Whereas because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States, and

Whereas the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

Now, Therefore, I, Harry S. Truman, President of the United States of America, acting under and by

virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as section 53.1 to 53.9 inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provisions of that section or of his proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952."

Extracts from Executive Order No. 7856 of 1938
March 31, 1938, 22 C.F.R., Part 51

§ 51.75 *Refusal to issue passport.* The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

§ 51.76 *Violation of passport restrictions.* Should a person to whom a passport has been issued knowingly use or attempt to use it in violation of the conditions or restrictions contained therein or of the provisions of the rules in this part the protection of the United States may be withdrawn from him while he continues to reside abroad.

§ 51.77 *Secretary of State authorized to make passport regulations.* The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to the rules in this part and not inconsistent therewith.

Extract from Regulations Issued by the Secretary
of State, 22 C.F.R., Part 53

§ 53.1 *Limitations upon travel.* No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into the continental United States, the Canal Zone, and all territories, continental or insular, subject to the jurisdiction of the United States, unless he bears a valid passport which has been issued by or under authority of the Secretary of State and which, in the case of a person entering or attempting to enter any such territory, has been verified by an American diplomatic or consular officer either in the foreign country from which he started his journey, or in the foreign country in which he was last present if such country is not the one from which he

started his journey, or unless he comes within one of the exceptions prescribed in §§ 53.2 and 53.3. No fee shall be collected by a diplomatic or consular officer of the United States for or in connection with such verification.

(1450-6)

COPY

No. 298

In the Supreme Court of the United States

OCTOBER TERM, 1960

CHARLES O. PORTER, PETITIONER

v.

CHRISTIAN A. HERTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

While this case was pending in the Court of Appeals for the District of Columbia Circuit in 1959, the petitioner filed a petition for writ of certiorari before judgment in the Court of Appeals, in an effort to have his case considered by this Court along with *Worthy* v. *Herter* and *Frank* v. *Herter,* in which petitions for certiorari were then pending: On December 7, 1959, certiorari was denied in *Worthy* and in *Frank* and also in the petitioner's case. 361 U.S. 918.

The Court of Appeals, which had also decided the *Worthy* (270 F. 2d 905) and *Frank* (269 F. 2d 245) cases, then heard the petitioner's case on the merits and on April 14, 1960 affirmed the action of the District Court in granting the respondent's motion for

summary judgment. The present petition[1] seeks review of that judgment of the Court of Appeals.

1. The petitioner, a Member of Congress from the State of Oregon, holds a valid passport containing the following endorsement (J.A. 1):

> This passport is not valid for travel to the following areas under control of authorities with which the United States does not have diplomatic relations: Albania, Bulgaria,[2] and those portions of China, Korea and Viet Nam under Communist control.

On June 10, 1959, the petitioner wrote to the Secretary of State requesting, on behalf of himself and a number of persons who were to accompany him, permission to visit Communist China (J.A. 3). The petitioner's stated purpose was to learn about conditions and trade potentialities and other facts relating to policy and legislative aspects (J.A. 2, 4; Pet. 3).

By letter of July 2, 1959, the Secretary replied in part as follows (J.A. 10–11):

> In 1952 the Department established the policy of not validating passports for Communist China. This policy is based on a number of considerations, among which are the fact that a state of unresolved conflict still exists between the United States and Communist China stemming from the latter's aggression against the

[1] The question presented in the present petition is substantially the same as the question presented in the earlier petition. (Compare the question presented at p. 2 of the Petition in No. 488, October Term, 1959 with that presented in the present petition at p. 2).

[2] Restrictions on travel to Bulgaria were removed May 12, 1959. Department of State Press Release No. 322.

United Nations in Korea and the fact that the Peiping regime continues to resort to force from time to time in the Taiwan Strait area. The emergency declared by President Truman in 1950 is still in effect.

Another factor of importance is that in the absence of diplomatic relations with Communist China, it is not possible for the Government to provide the customary protection to Americans traveling on the China mainland. In addition, the Communist Chinese have consistently maltreated Americans and continue to hold American citizens in prison as political hostages despite their pledge of September 10, 1955 to release them expeditiously. Another and important factor is the effort of the Communist Chinese to utilize trade and cultural contacts to promote political objectives hostile to our interests.

* * * * *

In your case, I might add that as a Member of Congress your visit would be interpreted throughout Asia as well as by the Communist Chinese as a basic change in policy at the very time when the Communists are engaged in liquidating the Tibetan revolt, threatening war in the Taiwan Straits and showing increasing arrogance and contempt for international law and decency.[3]

The petitioner's application was denied.

The petitioner subsequently was authorized by the Committee on Post Office and Civil Service of the House of Representatives to travel to Okinawa and Japan in his official capacity (J.A. 25), "to take care

[3] Cf. the prohibitions of 18 U.S.C. 953 (the Logan Act).

of matters pertaining to civilian employee problems" (J.A. 26). However, the petitioner at no time requested or received Congressional authority to travel to Communist China (J.A. 22, 24, questions 3, 4).

On August 27, 1959, the petitioner filed a complaint in the United States District Court for the District of Columbia, seeking injunctive relief, and also asking a judgment declaring that as a member of Congress he has a right to travel to Communist China in the interest of his legislative duties and that the Secretary's refusal to issue him a passport valid for travel to China is unlawful, and violates his constitutional rights as a citizen and a Congressman (J.A. 1–5). On September 14, 1959, the petitioner filed a motion for preliminary injunction (J.A. 14–15), followed the next day by a motion for summary judgment (J.A. 13). The Secretary then filed a motion to dismiss, or, in the alternative, a cross-motion for summary judgment (J.A. 21). The District Court, by order dated September 30, 1959, denied the petitioner's motions and dismissed the complaint (J.A. 27).

2. The petitioner concedes that the central issue involved in this case—the authority of the Secretary of State, in the implementation of foreign policy, to refuse to validate passports of American citizens for travel to Communist China—"is the same as that challenged in [the] *Worthy* and *Frank*" cases (Pet. 15). However, the petitioner again seeks to distinguish his case from *Worthy* and *Frank* (as he did in his earlier petition) on the ground that he is a Congressman and that the refusal of the Executive to validate his passport for travel to Communist

China interferes with his "legislative functions". (He alleges that his proposed investigation of conditions in Communist China constitutes an exercise of such function.) (Pet. 15–25.)

The investigatory powers of Congress can be exercised only pursuant to valid authorization. Although the petitioner was authorized by his Committee Chairman to travel to Okinawa and Japan to investigate matters pertaining to civilian employees of the United States Government in those areas, he has at no time received authorization from the House or any of its committees to travel to Communist China on behalf of Congress. The petitioner's status as a member of Congress cannot, in the circumstances of this case, raise, as he claims, an issue of separation of powers as between the Executive and Legislative Branches of the Government. As the court of appeals held, the "issue here is merely between a claim of an inherent right asserted in his individual capacity by a member of the legislative branch, and the plenary power of the executive branch asserted by it in relation to and in its conduct of the Nation's foreign affairs." (Pet. 29.)

The petitioner's case is governed by the decisions in the *Worthy* and *Frank* cases, *supra*, which, as we asserted in our previous briefs in opposition in those cases, were correct. There is no occasion for further review by this Court.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

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